Lim Ts-Fei v Lee Lai Tiam

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–17–5 OF 2011
ROHANA YUSUF J
21 JUNE 2011

Legal Profession — Breach of rules of etiquette — Conflict of interest — Vendor's solicitor in sale and purchase agreement of land lodged private caveat on land for third party — Action exposed both vendor and caveator to possible legal action — Whether differing findings by investigating tribunal and disciplinary committee caused breach of natural justice and concealed charges against solicitor — Whether accepting 'brief' simply meant accepting instructions — Legal Profession (Practice and Etiquette) Rules 1978 rr 3(a), 4 & 5

The appellant, an advocate and solicitor, appealed against the decision of the disciplinary board ('DB') under the Legal Profession Act 1976 ('the Act') that found her in breach of rr 3(a), 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules'). The complaint against the appellant was that she had lodged a private caveat on behalf of a client on four pieces of land ('the lands') while, at the same time, acting for the vendor of the lands in concurrent agreements for the sale of the lands. The respondent in the appeal acted for the purchaser under those agreements. The DB found the appellant had put herself in a position of conflict of interest as her lodgment of the caveat would potentially have caused her vendor-client to be sued by the purchaser of the lands for not being able to pass title to him on receipt of the purchase money and equally caused her caveator-client to be sued by the vendor and/or the purchaser. The appellant argued that the DB was wrong in finding her in breach of the rules as, inter alia: (i) the word 'brief' in the rules related to conduct of proceedings in court and not to non-contentious conveyancing transactions such as lodgment of a private caveat; (ii) the use of the words 'may be' and 'possible' in the letter of complaint against the appellant rendered the 'charges' defective and caused prejudice; (iii) there had been a breach of natural justice as the investigating tribunal ('IT') had found her only in breach of r 3(a) of the Rules whereas the disciplinary committee ('DC') found she had, in addition, violated 4 and 5 of the Rules and as such the charges against her were not definite and she was not told what the charges were; and (iv) the appellant's actions did not amount to 'grave impropriety' under s 94(3) of the Act.

Held, dismissing the appeal with costs:

(1) The case against the appellant had been made out beyond reasonable doubt. The act of lodging the private caveat clearly placed the appellant in

a position of conflict that she would not have been able to defend had the situation turned for the worst. Allowing herself to be caught in the middle of a family dispute was not a wise thing to do (see para 18).

(2) It was no surprise that the findings of the IT differed from that of the DC. The latter, being charged with the task of undertaking a formal investigation, could consider other charges the appellant may have breached. The purposes of both the IT and DC were only to investigate and recommend to the DB. A definite charge may not be necessary, at least until the matter was before the DB. In the circumstances, the appellant did not need to be told of the charges simply because there was none to tell (see para 15).

(3) A breach of any provision of the Act or of any rules made thereunder, including of practice and etiquette, or any direction or ruling of the Bar Council, was a misconduct which amounted to grave impropriety. The court was not at liberty to question the wisdom of Parliament in enacting the provision (see para 17).

(4) The letter of complaint was not a 'charge' but simply an expression of dissatisfaction or grievance setting out the facts believed to be sufficient to support the matter complained of. There was no need for a letter of complaint to refer to any rule or law that the advocate and solicitor may have breached (see para 13).

(5) Accepting a 'brief' in our jurisdiction meant no more than accepting instructions. A brief need not relate to the conduct of court proceedings as it need not necessarily be followed by court proceedings. Instructions to lodge a private caveat was therefore a 'brief' under the rules (see paras 9–10).

(6) Even though a brief did not necessarily mean there was already an action in court, a mere prospect of a suit sufficed. In this case, the prospect of a suit was real since there was a family dispute. The lodgment of the caveat was therefore a step towards court proceedings and hence related to the conduct of court proceedings (see paras 10–11).

[Bahasa Malaysia summary

Perayu, seorang peguambela dan peguamcara, membuat rayuan terhadap keputusan lembaga disiplin ('LD') di bawah Akta Profesion Undang-Undang 1976 ('Akta') yang mendapatinya melanggar kk 3(a), 4 dan 5 Kaedah-Kaedah Profesion Undang-Undang (Amalan dan Kesopanan) 1978 ('Kaedah-Kaedah'). Aduan terhadap perayu adalah bahawa dia telah membuat kaveat persendirian bagi pihak seorang klien bagi empat bidang tanah ('tanah-tanah tersebut'), sedangkan pada masa yang sama, bertindak bagi penjual tanah dalam perjanjian-perjanjian serentak bagi jualan tanah-tanah tersebut. Responden dalam rayuan itu, bertindak bagi pembeli di bawah

perjanjian mereka. LD mendapati perayu telah meletakkan dirinya dalam kedudukan konflik kepentingan kerana penyerahan kaveat berkemungkinan akan menyebabkan penjual-pelanggannya disaman oleh pembeli tanah kerana tidak dapat memberikan hak milik kepadanya apabila menerima wang pembelian dan juga menyebabkan pengkaveat-pelanggannya akan didakwa oleh penjual dan/atau pembeli. Perayu menghujahkan bahawa LD terkhilaf dalam memutuskan bahawa dia melanggar kaedah tersebut kerana, antara lain, (i) perkataan 'brief' dalam kaedah-kaedah berkaitan dengan menjalankan prosiding di mahkamah dan bukan dengan urusniaga pemindahakkan yang tidak dipertikaikan contohnya sebagai penyerahan kaveat persendirian; (ii) penggunaan perkataan 'may be' dan 'possible' dalam surat aduan terhadap perayu menyebabkan kecacatan 'charge' dan menyebabkan prejudis; (iii) telah berlaku pelanggaran keadilan asasi kerana tribunal penyiasatan ('TP') telah memutuskan dia hanya melakukan pelanggaran 3(a) Kaedah-Kaedah manakala jawatankuasa disiplin ('JD') mendapati dia, sebagai tambahan, telah mencabuli kk 4 dan 5 Kaedah-Kaedah dan dengan demikian, tiada ketetapan bagi tuduhan terhadapnya dan dia tidak diberitahu apakah tuduhan-tuduhannya; dan (iv) tindakan perayu tidak terjumlah kepada 'grave impropriety' di bawah s 94(3) Akta.

Diputuskan, menolak rayuan dengan kos:

(1) Kes terhadap perayu telah dibuat tanpa sebarang keraguan yang munasabah. Tindakan menyerahkan kaveat persendirian dengan jelas meletakkan perayu dalam kedudukan konflik bahawa dia tidak akan dapat memperbaiki keadaan jika situasi berubah menjadi buruk. Membenarkan dirinya terperangkap di tengah-tengah pertikaian keluarga bukanlah satu perkara yang bijak untuk dilakukan (lihat perenggan 18).

(2) Adalah tidak menghairankan bahawa keputusan TP berbeza daripada JD. JD, dituduh bagi tugas untuk menjalankan penyiasatan formal, boleh mempertimbangkan pertuduhan lain yang mungkin dilanggari perayu. Tujuan kedua-dua TP dan JD hanya untuk menyiasat dan memberi cadangan kepada LD. Tuduhan yang tepat mungkin tidak perlu, sekurang-kurangnya sehingga perkara itu didengar oleh LD. Dalam keadaan ini, perayu tidak perlu diberitahu tuduhannya semata-mata kerana tiada tuduhan untuk diberitahu (lihat perenggan 15).

(3) Sesuatu pelanggaran mana-mana peruntukan Akta atau mana-mana kaedah-kaedah yang dibuat di bawahnya, termasuk amalan dan kesopanan, atau apa-apa arahan atau keputusan Majlis Peguam, adalah salah laku yang membentuk 'grave impropriety'. Mahkamah tidak bebas untuk mempersoalkan kebijaksanaan Parlimen dalam menggubal peruntukan (lihat perenggan 17).

(4) Surat aduan bukanlah tuduhan tetapi hanya ungkapan rasa tidak puas hati atau rungutan yang menyatakan fakta-fakta yang dipercayai mencukupi untuk menyokong perkara yang diadukan. Tiada keperluan bagi surat aduan untuk merujuk kepada mana-mana kaedah atau undang-undang yang mungkin dilanggari peguambela dan peguamcara (lihat perenggan 13).

(5) Menerima arahan dalam bidang kuasa mahkamah bermakna tidaklah lebih daripada menerima arahan. Arahan tidak semestinya berkaitan dengan penjalanan prosiding mahkamah kerana ia tidak semestinya diguna pakai oleh prosiding mahkamah. Oleh itu, arahan untuk membuat kaveat persendirian adalah arahan di bawah kaedah-kaedah (lihat perenggan 9–10).

(6) Walaupun arahan tidak bermakna sudah ada suatu tindakan di mahkamah, kemungkinan semata-mata mengenai sesuatu guaman adalah memadai. Dalam kes ini, prospek saman adalah benar kerana terdapat pertikaian keluarga. Oleh itu, penyerahan kaveat adalah langkah ke arah prosiding mahkamah dan seterusnya berkaitan dengan perlakuan prosiding mahkamah (lihat perenggan 10–11).]

Notes:

For a case on conflict on interest, see 9 *Mallal's Digest* (4th Ed, 2010 Reissue) para 1429.

Cases referred to

Butler v Fairclouagh (1917) 23 CLR 78 (refd)

Legislation referred to

Legal Profession Act 1976 ss 94(3), 103E
Legal Profession (Practice and Etiquette) Rules 1978 rr 3(a), (b), 4, 5
National Land Code

Oon Chee Kheng (M Seethaletchimy with him) (CK Oon & Co) for the appellant.
Lee Lai Thiam (Lee Lai Thiam & Partners) for the respondent.
Kemkumar S Lopez (Kamaruddin & Partners) for the disciplinary board.

Rohana Yusuf J:

[1] This is an appeal pursuant to s 103E of the Legal Profession Act 1976 against the decision of the disciplinary board ('the board') dated the 10 December 2010. The facts of the complaint are that on the 27 February 2001 the appellant lodged a private caveat on behalf of one Puah Swee Seong on four pieces of land. The said lands were subject of four sale and purchase agreements all dated the 13 October 1999 in which the appellant represented the vendor one Teh Chai Cheow (the administrator of the estate of Teh Aik Cheong) while

A the purchaser one Madam Puah Pek Yok was represented by the respondent. By reason thereof, the board found that the appellant had breached rr 3(a), 4 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 ('the Rules').

THE BOARD'S FINDINGS

B

[2] The findings of the board were:

(a) that the appellant in lodging the private caveat would have caused her client to suffer potential legal action against him by the purchaser as he C may not be able to pass title to the purchaser having received payment from the purchaser; and

(b) the appellant in lodging the private caveat would have caused her client as caveator to suffer potential legal action against him by the vendor and or by the purchaser as the appellant was informed that the moneys were paid D by the purchaser and not the mother of the purchaser and caveator one Madam Teng Hong, as alleged by the caveator.

[3] From the above findings, it was not difficult to see that the appellant had E placed herself in a position of conflict or at least in a position where the interest one client was incompatible with the other.

[4] Nevertheless, learned counsel for the appellant Encik Oon Chee Kheng argued that the facts do not satisfy the ingredients of the Rules. He said that F since the word 'brief' in the Rules means a statement of a client's case written by the solicitor for the instruction of counsel in civil or criminal proceedings, the Rules must therefore relate to conduct of proceedings in court. Encik Oon referred to several dictionaries for the meaning in support of this argument. That being the case, he concluded that the Rules in which the appellant had G been found to have breached do not apply to the conduct complained of, that is, the lodgement of the private caveat, which essentially, he further said, is an act unrelated related to the conduct of court proceedings.

[5] Encik Oon also contended that the word 'embarrassment' is defined and H confined to r 3(b) and together with the words 'matter' and 'proceedings' appearing in the second limb thereto, refer to contentious cases in court and are not applicable to non-contentious conveyancing transactions, such as those in this case.

I **[6]** Encik Kern Kumar Lopez appearing on behalf of the board, on the other hand, argued that the lodgement of the private caveat was a first step taken which could trigger potential suits; a situation, which Encik Oon vehemently refuted by pointing out to this court that no suits had been filed to date. Encik Kern Kumar Lopez also laid emphasis on the fact that that the appellant was

aware of the situation at the time, which in her own words was, 'clearly a family dispute for distribution of properties'. Nevertheless, the appellant was of the view that she was entitled to lodge the private caveat once the transfers to the said lands had been perfected, which she believes was the case.

THE RULES

[7] In order to appreciate the arguments put forth by learned counsel for the appellant and board, it would be useful to produce the relevant Rules, which I normally would do in my judgment and they appear herein below:

3 Advocate and solicitor not to accept brief if embarrassed

(a) An advocate and solicitor shall not accept a brief if he is or would be embarrassed.

(b) An embarrassment arises —

(i) where the advocate and solicitor finds he is in possession of confidential information as a result of having previously advised another person in regard to the same matter;

(ii) where there is some personal relationship between him and a party or a witness in the proceedings.

4 No advocate and soiicitor to accept brief if professional conduct likely to be impugned.

No advocate and solicitor shall accept a brief in a case where he knows or has reason to believe that his own professional conduct is likely to be impugned.

5 No advocate and solicitor to accept brief if difficult to maintain professional independence.

(a) No advocate and solicitor shall accept a brief if such acceptance renders or would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

(b)

(i) An advocate and solicitor who has at any time advised or drawn pleadings or
acted for a party in connection with the institution or prosecution or defence of any suit, appeal of other proceedings shall not act, appear or plead for the opposite party in that suit, appeal or other proceedings.

(ii) An advocate and solicitor shall not act unless the consent of the first party for whom the advocate and solicitor acted is obtained in writing and the advocate and solicitor is not embarrassed by so acting

A COURT'S FINDING

[8] While I take note of the fact that the word 'brief' as submitted by learned counsel for the appellant relate to the conduct of court proceedings, I also take cognisance of the fact that its definitions for the most part refer to practices throughout the United Kingdom and some other jurisdictions. In those jurisdictions, there is a clear distinction between the role of a solicitor and barrister. A barrister may act only upon instructions of a solicitor and has the right of audience, though not exclusive, in the High Court and superior courts. A 'brief' in those jurisdictions refers to documents containing materials or instructions furnished by a solicitor to a barrister to enable him represent the client in legal proceedings. A brief consists, normally of a narrative of the facts of the case and reference to a relevant law. There are annexed to counsel's opinion; a copy of material documents, formal pleadings, correspondence, and proof of evidence of witness. Such obviously is not the case in our jurisdiction. The legal profession here is said to be fused, that is to say, there are no separate and distinct roles between an advocate and solicitor. An advocate and solicitor is both solicitor and barrister. He is the same person. That being the case, the acceptance of a 'brief' under the Rules simply cannot be that contemplated in the definitions put forth by learned counsel for the appellant. I say this because an advocate and solicitor may receive instructions from a client, prepare all the necessary documents and represent his client in court. All that is required of an advocate and solicitor to have the right of audience in any civil courts a valid practising certificate. That being the case, there is no necessity for him to furnish a brief to another party. Therefore, when the Rules say that an advocate and solicitor 'accepts a brief', it generally means he accepts instructions; be it from his client or another advocate and solicitor. To hold that a brief can only be accepted from another advocate and solicitor makes little sense of the Rules. For that reason, I am prepared to hold that a 'brief' in our jurisdiction is no more than instructions.

[9] Having said that a 'brief' is nothing more than instructions I must now consider if a 'brief' must necessarily relate to the conduct of court proceedings. Given the nature of a 'brief' in our jurisdiction, I am quite prepared to hold that a 'brief' need not relate to the conduct of court proceedings. This is because a 'brief' need not necessarily be followed by court proceedings. There are, needless to say, alternative ways of settling dispute; mediation, the current 'buzz word', being one. Therefore, instructions to lodge a private caveat in this case is 'brief' under the Rules.

[10] Even if I am wrong in the above instance, I am inclined to agree with the submission put forth by Encik Kem Kumar Lopez that a brief does necessarily mean that there is already an action filed in court, a mere prospect a suit suffice. In this case, the prospect of a suit is real since there was a family dispute. The

lodging of the private caveat therefore must be regarded as a step towards court proceedings. In this regard, I must also emphasise on the purpose of lodging a private caveat. A private caveat is not lodged without any reason or rhyme. A private caveat allows a holder of an equitable interest to obtain protection under the National Land Code. The purpose of the private caveat is to protect the caveator's interest from being defeated by the registration of a dealing without the caveator having had an opportunity to invoke the assistance of the court to give effect to the caveator's interest. In other words, it is lodged with a view that court proceedings would ensue. In *Butler v Fairclouagh* (1917) 23 CLR 78 at p 79 Griffith CJ observed that:

> It must now be taken to be well settled that under the Australian system of registration of titles to land the courts will recognise equitable estates and the rights except so far as they are precluded from doing so by statute. This recognition is, indeed, the foundation of the scheme of caveats which enable such rights to be temporarily protected in anticipation of legal proceedings.

[11] Such being the case, the lodgement of a private caveat is no doubt a step towards court proceedings. It therefore relates to the conduct of court proceedings. I am must also say that it is a fallacy to regard the lodgement of the private caveat as simply work in relation to a non-contentious conveyancing transactions as contended by learned counsel for the appellant.

[12] In her defence at the hearing before the investigating tribunal, the appellant also said that she is entitled to lodge the private caveat once the transfers to the said lands had been perfected, which she believes was the case. I must comment and say that that defence makes no sense. Why would the caveator want to lodge a private caveat when the purpose cannot be met? Such unreasoned statement confirms the incongruity of the situation.

LETTER OF COMPLAINT

[13] Learned counsel for the appellant also said that the charges against the appellant in the letter of complaint dated 28 February 2005 are defective because it prefaced with the words 'may be' and 'possible'. However, I am not particularly convinced that the use of such words alone had caused a breach of natural justice or that the appellant had been unduly prejudiced. As a corollary, a letter of complaint is not a 'charge'. It is simply an expression of dissatisfaction or grievance setting out the facts believed to be sufficient to support the matter complained of against an advocate and solicitor. Typically, a client or his solicitor writes the letter of complaint in plain and ordinary language. The allegations contained therein are not framed as charge. This is to enable the advocate and solicitor to response, likewise, in plain language. The purpose, I am sure, is to enable the client to understand the explanation as much as

possible. For that reason also, there is no need for a letter of complaint to refer to any rule or law that the advocate and solicitor may have breached. I cannot imagine how difficult the situation would be if a letter of complaint were framed as charge, couched in legal language and responded likewise. Therefore, I am unable to appreciate this argument and hold that this issue merits no consideration.

FINDINGS OF THE INVESTIGATING TRIBUNAL AND DISCIPLINARY COMMITTEE

[14] Learned counsel for the appellant also brought to the attention of this court that there is a difference in the findings of the investigating tribunal and the disciplinary committee. The investigating tribunal in its report said that the appellant's conduct had violated r 3(a) while the disciplinary committee's findings were that the appellant had breached rr 3(a), 4 and 5. For this reason, he contended that there had been a breached of natural justice in that the appellant the charges against the appellant were not definite and that she was not told of what the charges are.

[15] As I understand it, the investigating tribunal makes recommendations to the board and the board may appoint the disciplinary committee to undertake a formal investigation. Therefore, it is no surprise that the findings of the Investigating Tribunal may be different from that of the disciplinary committee. The latter being charged with the task of undertaking a formal investigation may consider other charges that the appellant may have been in breach of. Both findings, be it the investigating tribunal of the disciplinary committee, are investigative in nature. A definite charge may not be necessary, at least, until the matter is before the board. Both purposes are only to investigate and recommend to the board. Therefore, in the circumstances, the appellant need not be told of the charges simply because there none to tell. In any event I unable to understand how the appellant could be ignorant of what might the charges be. An advocate and solicitor simply cannot place himself in a position where the interest one client was incompatible with the other over the same subject matter. Lodging a private caveat on behalf of a third party while representing a vendor in a property sale transaction is certainly one such instance.

CROSS-EXAMINATION

[16] Learned counsel for the appellant also point to the fact that counsel for the appellant in the hearing before the investigating committee was not permitted to cross-examine the respondent. Although I recognised the fact the fact that the right to cross-examine must afforded to an accused so that he may be able to confront the accuser. It must nevertheless be done for a purpose. In

this case, no mention of the purpose was made and therefore, I am unable to see how the appellant had been prejudiced or denied natural justice. The act of the appellant in lodging the private caveat was in any event never denied.

MISCONDUCT

[17] Lastly, learned counsel for the appellant contended that the appellant's act does not amount to a 'grave impropriety' under s 94(3) of the Legal Profession Act 1976. Grave impropriety, accordingly to Encik Oon must take into account the transaction judged as a whole and whether the conduct was not inconsistent with general professional fitness and habitual adherence to moral standards. I am, however, unable to agree. A breach of any provision of the Legal Profession Act 1976 or of any rules made thereunder or any direction or ruling of the Bar Council a misconduct, which amounts to grave impropriety. A breach of any rule of practice and etiquette of the profession made by the Bar Council under the Act or otherwise is also, misconduct amounting to grave impropriety. Such is the high standard of the profession. The appellant had been found to have breached the Rules and that clearly amounted to a misconduct, which amounts to grave impropriety. This court is not at liberty to question the wisdom of Parliament in enacting the provision, more so when I do not see any reason to disturb the findings of the board.

[18] It is my view that the case against the appellant had been made out beyond reasonable doubt. The act of lodging the private caveat had clearly placed the appellant in somewhat precarious position. A position of conflict that she would not be able to defend had the situation turned for the worst. Allowing herself to be caught in the middle of a family dispute was not a wise thing to do. This is precisely what an advocate and solicitor ought to avoid. There is this duty to perfect the transfers while at the same time a duty to prevent the same. Both cannot subsist at the same time. What would her clients say? Surely, it does not reflect kindly on her integrity and morality. A law professor once described a lawyer in the third world as a 'hired gun'. Let us not make that so. Let us continue to strive for a better Bar. For the reasons I have given herein, I hereby dismissed this appeal with costs of RM4,000 to disciplinary board and RM2,500 to the respondent.

Appeal dismissed with costs.

Reported by Ashok Kumar